

Annexure EDR - 2



Our ref: PID-2020-400006

1 May 2020

By email to:

Dear discloser

Notification of allocation decision under s 44 of the *Public Interest Disclosure Act 2013*

I refer to your disclosure to our Office regarding the conduct of staff at the Federal Court Statutory Agency (FCSA).

I have finalised my assessment under s 26 of the *Public Interest Disclosure Act 2013* (PID Act) of the information you provided to our Office. I am writing to advise you that I have assessed the information you provided as meeting the threshold of a public interest disclosure (PID).

This assessment determines whether your disclosure is a 'public interest disclosure' (PID), and whether or not the disclosure will be allocated to an agency for handling.

The assessment does not determine whether or not disclosable conduct has occurred, and does not constitute an investigation of a disclosure.

My assessment of your disclosure under s 26 of the PID Act

Under the PID Act three criteria must be met:

- the discloser must be a public official;
- the information disclosed must tend to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct; and
- the information disclosed must be provided to an authorised internal recipient.

Having regard to the information provided, I have determined that your disclosure meets the definition of a PID for the following reasons:

- you have indicated that you are a public official for the purposes of the PID Act on the basis of your engagement as a non-ongoing APS employee;
- you believe on reasonable grounds that the information tends to show one or more instances of disclosable conduct;
- the disclosure was made to an authorised internal recipient, in this case the Commonwealth Ombudsman. This criteria was met as you provided an explanation as to why you believed on reasonable grounds that it would be appropriate for the disclosure to be investigated by the Ombudsman.

Allocation of a PID under s 43 of the PID Act

Having assessed your disclosure as a PID, the PID Act requires an Authorised Officer to allocate the handling of the PID to one or more agencies.

In the case of your PID, I have decided to allocate it to the Australian Public Service Commission (APSC) for handling. This is in view of the fact that your allegations implicate both Mr Warwick Soden and Ms Sia Lagos – the FCSA's substantive and acting agency heads respectively – and relate to alleged Code of Conduct breaches under the *Public Service Act 1999*.

While you proposed an alternative mechanism by which the disclosure could be allocated initially to our Office, and then transferred to the APSC under the *Ombudsman Act 1976*, this is not our usual practice in such circumstances. We consider it more appropriate to allocate disclosures relating to agency heads directly to the APSC, under the PID Act, noting the broad discretion under s 43(3)(b) to consider all relevant matters when deciding the allocation.

Protections under the PID Act

As I have assessed your matter as a PID, you are protected from reprisals or threatened reprisals, including injury, dismissal or discrimination between you and other employees. You can take action through the Federal Court or Federal Circuit Court to seek compensation or an injunction if reprisal action is taken or threatened because of your disclosure. It is also a criminal offence for a person to take or threaten reprisal action against you because of your disclosure.

It is also a criminal offence for anyone who deals with your disclosure to disclose information to anyone else that might identify you as the source of the PID without your consent unless:

- the identifying information is disclosed for the purposes of the PID Act, or another Commonwealth law; or
- it is to assist the Ombudsman or the IGIS perform their PID functions.

Additionally, you are immune from civil, criminal or administrative liability (such as a breach of official secrecy laws or an action for defamation) for making your disclosure, however, a discloser is not protected from the consequences of their own wrongdoing.

Next steps – Consent requirements for allocation

As part of the allocation process I must seek to obtain the following:

- consent from you to inform the Principal Officer of the APSC of your contact details (and name if you now choose to provide it); and
- consent from an Authorised Officer in the APSC for our Office to allocate your disclosure to the APSC.

Please advise if you consent to me providing your contact details to the Principal Officer of the APSC. In the event that you have changed your position on anonymity, you may also choose to provide your name to the APSC.

I note that there is no requirement for you to provide consent as outlined above, however in some cases investigation of a PID may be more difficult where the discloser is anonymous.

Provision of your non-identified email address to the APSC would at least allow the APSC to communicate with you about the disclosure. From the covering letter you have addressed (and provided to us to convey) to Mr Peter Woolcott AO, it appears that you were potentially open to this possibility.

I would appreciate your response on this consent issue by close of business 7 May 2020.

Additional functions of the Commonwealth Ombudsman

The PID Act provides for disclosers to complain to our Office regarding the allocation or investigation of a public interest disclosure. Where such complaints are made, our Office considers the lawfulness, reasonableness and fairness of an agency's handling of the PID having regard to all the circumstances. A complaint can be made to the Ombudsman's Office using our online complaint form available at www.ombudsman.gov.au or by phone on 1300 362 072.

If you have any questions regarding the information in this letter I can be contacted by return email.

Yours sincerely

Elizabeth Bennet
Authorised Officer
Public Interest Disclosure Team
Commonwealth Ombudsman

Influencing systemic improvement in public administration